

# CRIMINAL LAW AT THE INTERNATIONAL BORDER

Joseph A. Milchen\*

*Sound policy considerations support the special treatment accorded border searches. Congress as well as the courts have thus recognized the peculiar and difficult law enforcement problems that necessarily are presented by the effective policing of our extensive national boundaries.<sup>1</sup>*

The extensiveness of our national boundaries is indeed impressive. Of the forty-eight states in the continental United States, thirty-one are located with some portion of their external boundary forming the international border of the United States.<sup>2</sup> Of course, both of the non-contiguous states, Alaska and Hawaii, are completely surrounded by territory foreign to the United States. Additionally, it should be noted that all of the territories of the United States, to which the criminal jurisdiction of the federal government extends,<sup>3</sup> are likewise only accessible from areas outside the jurisdiction of the United States.

These geographical considerations are set forth to indicate the potential scope of legal problems that might arise at an international border. The mere length of the border permits imaginative speculation regarding possible violations of customs laws.

Modern means of communication and travel intensify the situation. People are simply better equipped to cross the border. The projected figure for border crossings in 1968 is over 213 million

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\*Assistant United States Attorney for the Southern District of California; Member, State Bar of California. J.D., University of Michigan Law School, 1965. The views expressed in this article are to be attributed to the author and not to the United States Department of Justice.

1. *King v. United States*, 348 F.2d 814, 818 (9th Cir.), *cert. denied*, 382 U.S. 926 (1965).

2. Fourteen states form the eastern seaboard of the country, five states are along the Gulf of Mexico, four states border the Republic of Mexico, three states comprise the West Coast, and thirteen states constitute the northern boundary with Canada. The ratio of states along some international boundary to those which are not is almost two to one.

3. "The term 'United States', as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone." 18 U.S.C. § 5 (1964).

entries.<sup>4</sup> This figure is startling when contrasted with the smaller number, 200 millions, of people residing within the United States. The boundary is impressively long and the traffic is much greater than most people realize. These factors become the subject of intense concern when related to the immense amount of contraband, particularly narcotics, which is brought into the United States.<sup>5</sup> For the most part, narcotics and marihuana do not originate locally within the United States. Dangerous drugs, although manufactured within the United States, generally are accessible without justifiable reason only outside the country. The illegal traffic in these items invariably involves criminal importation into this country. Because the prime consequences of illegal importation involve criminal repercussions, the border law which had developed has arisen in the context of a criminal case.

Although some aspects of the law applicable at the international border are well settled, neither legislative insight, nor fertile imagination nor past experience provide sufficient perception to cover the myriad situations that can arise at the border. Furthermore, new developments in related fields must be examined insofar as the border crossing situation may affect or be affected by them. As a result, there are the following areas of interest:

- (1) the nature of the fourth amendment prohibition against unreasonable searches and seizures in its application to the border;
- (2) the subsequent importation, without declaration, of contraband taken from the United States into a foreign country;
- (3) the applicability of the fifth amendment privilege against self-incrimination to the proscriptions against illegal importation and to the statutory presumptions;
- (4) the introduction of contraband into the United States with the consent and knowledge of governmental agents;
- (5) the disclosure of the identity of the border informer, and the procedure to be followed in determining this issue;
- (6) the admissibility of responses to interrogatories during temporary detention by governmental officials at the border; and
- (7) the nature of "intent" required by each illegal importation statute, and the possibility of overlapping application of the statutes.

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4. This projection is based on a similar percentage increase of border entries computed during the fiscal year 1967. 1967 Annual Report of the Secretary of the Treasury (Table 85).

5. 1967 Annual Report of the Secretary of the Treasury (Table 90).

## I. THE FOURTH AMENDMENT AT THE BORDER

It has always been quite evident that the stoppings, searches and seizures at an international border are to be considered in a different light from those conducted internally in the United States. When the Supreme Court announced its initial major expositions on the fourth amendment, the border situation received consideration. In *Boyd v. United States*,<sup>6</sup> the Court noted:

The search for and seizure of . . . goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*.<sup>7</sup>

Again, in *Carroll v. United States*,<sup>8</sup> the Court states that "[t]ravellers may be . . . stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."<sup>9</sup>

Citing this language from *Boyd* and *Carroll* as a basis, courts have recognized that at the border "different rules of law are applicable."<sup>10</sup> "A search of persons entering the United States from a foreign country is in a separate category from searches generally."<sup>11</sup> The search conducted at the border by customs officials is "of the broadest possible character and any evidence received might be used."<sup>12</sup> The right of privacy of those crossing the international boundary is restricted,<sup>13</sup> and a certain invasion of privacy is justified by the mere fact of international travel.<sup>14</sup> The uniqueness of the border situation is reiterated frequently.<sup>15</sup>

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6. 116 U.S. 616 (1886).

7. *Id.* at 623.

8. 267 U.S. 132 (1924).

9. *Id.* at 154.

10. *Witt v. United States*, 287 F.2d 389, 391 (9th Cir. 1961).

11. *Denton v. United States*, 310 F.2d 129, 131 (9th Cir. 1962).

12. *Landau v. United States Attorney*, 82 F.2d 285, 286 (2d Cir. 1936). *See also, e.g., United States v. Rodriguez*, 195 F. Supp. 513 (S.D. Tex. 1960), *aff'd* 292 F.2d 709 (5th Cir. 1961).

13. *Landau v. United States Attorney*, 82 F.2d at 286.

14. *Deck v. United States*, 395 F.2d 89, 90 (9th Cir. 1968).

15. *See, e.g., Thomas v. United States*, 372 F.2d 252, 254 (5th Cir. 1967); *Witt v. United States*, 287 F.2d at 391; *United States v. Yee Ngee How*, 105 F. Supp. 517, 519 (N.D. Cal. 1952). *See also Decca v. United States*, 346 F.2d 158 (5th Cir. 1965); *United States v. Massiah*, 307 F.2d 62, 67 (2d Cir. 1962), *rev'd on other grounds*, 377 U.S. 201

National self-protection and collection of duties provide the compelling rationale for treating the requirements of the fourth amendment in a different light at the border.<sup>16</sup> "[A] search which would be 'unreasonable' within the meaning of the fourth amendment, if conducted by police officers in the ordinary case, would be a reasonable search if conducted by Customs officials."<sup>17</sup> This is not to say that the fourth amendment has no application at the border. Although it might be argued that there is no limit to the extent of a search of a person and his belongings at the border (the unlimited search being the only means to insure adequately that goods subject to duty do not escape detection or that the national self-interest is secured), it has been held that a border search is not exempt from the constitutional test of reasonableness.<sup>18</sup>

Undoubtedly a systematic and arbitrary method of search, such as searching every tenth car or only Negroes, would run afoul of constitutional requirements. However, the mere fact that all persons are not subjected to the same type of search at a border does not prevent a more thorough search of one person.<sup>19</sup> Furthermore an initial cursory search by governmental officials does not preclude a subsequent, more thorough search by the same agency<sup>20</sup> or another.<sup>21</sup> The momentary escape from detection does not immunize the traveller against further interrogation and

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(1964); *Hoxie v. United States*, 15 F.2d 762 (9th Cir. 1926); *United States v. McGlone*, 266 F. Supp. 673 (E.D. Va. 1967). Cf. *General Motor Acceptance Corp. v. United States*, 286 U.S. 49, 56 (1932) (where the Court upheld forfeiture of vehicles carrying contraband as "one of the time-honored methods adopted by the Government for the repression of the crime of smuggling").

16. *Carroll v. United States*, 267 U.S. at 138-39. See also *Thomas v. United States*, 372 F.2d at 254.

17. *Alexander v. United States*, 362 F.2d 379, 381 (9th Cir.), cert. denied, 385 U.S. 977 (1966).

18. *Thomas v. United States*, 372 F.2d at 254; *Marsh v. United States*, 344 F.2d 317, 324 (5th Cir. 1965); *Patenotte v. United States*, 266 F.2d 647 (5th Cir. 1959).

19. *Witt v. United States*, 287 F.2d at 391.

20. *Morales v. United States*, 378 F.2d 187, 190 (5th Cir. 1967) (initial and subsequent searches by customs officials). See also *Fernandez v. United States*, 321 F.2d 283, 286 n.4 (9th Cir. 1963). In *United States v. Yee Ngee How*, 105 F. Supp. 517 (N.D. Cal. 1952), a search of a seaman who disembarked was not precluded by a search the previous day when he went ashore. The situation was viewed much in the same manner as that of a person leaving the country and desiring to enter. *Id.* at 521.

21. *Rivera v. United States*, 327 F.2d 791 (1st Cir. 1964) (initial search by immigration officers and second one by customs officials).

22. *Thomas v. United States*, 372 F.2d at 255; *United States v. Rodriguez*, 195 F. Supp. at 516.

23. *Taylor v. United States*, 352 F.2d 328 (9th Cir. 1965).

examination,<sup>22</sup> particularly where the traveller evades the initial examination by his own deception.<sup>23</sup>

The border is elastic.<sup>24</sup> A border search is not confined to the port of entry. Thus, searches have been sustained as border searches between the gangway of a ship and the pier gate which opened out onto the public streets of a city,<sup>25</sup> 850 feet from the border with a closeness in time,<sup>26</sup> five blocks away and 25 minutes after entry,<sup>27</sup> six blocks and one and one-half hours in an urban area,<sup>28</sup> 14 miles,<sup>29</sup> 20 miles,<sup>30</sup> and even 75 miles.<sup>31</sup> However, a search some 63 miles from the border, with no discussion of the time element, and not predicated on probable cause,<sup>32</sup> was held to be unreasonable.

Even if a search cannot be sustained as a border search per se, the mere fact that the activities occur in close proximity to the border increases the likelihood of finding that the search was based upon probable cause. The same activities by an individual may seem much more incriminating near the border than if committed elsewhere.<sup>33</sup>

Distance and time become relative factors when the test of a border search is "a determination [of] whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance [from time of entry by governmental agents], are such as to convince the fact finder with reasonable certainty"<sup>34</sup> that the person or vehicle is in the same condition as when the border was crossed.<sup>35</sup> Even if searches occur

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24. *Marsh v. United States*, 344 F.2d at 324.

25. *United States v. Yee Ngee How*, 105 F. Supp. 517.

26. *Taylor v. United States*, 352 F.2d at 329.

27. *Valadez v. United States*, 358 F.2d 721 (5th Cir. 1966).

28. *Thomas v. United States*, 372 F.2d at 255.

29. *Haerr v. United States*, 240 F.2d 533 (5th Cir. 1957). *See also Flores v. United States*, 234 F.2d 604 (5th Cir. 1956).

30. *United States v. Rodriguez*, 195 F. Supp. at 513.

31. *Ramirez v. United States*, 263 F.2d 385 (5th Cir. 1959). This search was justified as a border search. It probably could have been better justified as a valid immigration search. *See text accompanying note 41 infra*.

32. *Marsh v. United States*, 344 F.2d at 324-25.

33. Thus, the search of the bags to be shipped by train in a border city was held justified, the court taking judicial notice that the city, El Paso, Texas, was a great source of narcotics cases. *Romero v. United States*, 318 F.2d 530 n.1 (5th Cir. 1963). *But see Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966). In *Mansfield v. United States*, discarding an item and retrieving it after entry into the public streets by a crewman also justified a search. 308 F.2d 221 (5th Cir. 1962).

34. *Alexander v. United States*, 362 F.2d at 382.

35. *Rodriguez-Gonzalez v. United States*, 378 F.2d 256 (9th Cir. 1967); *Alexander v. United States*, 362 F.2d at 382-83; *King v. United States*, 348 F.2d at 816.

some distance from the border, such as 6<sup>36</sup> or 15 miles,<sup>37</sup> the search is valid.<sup>38</sup> The fact that the person or vehicle is temporarily out of sight does not alter the character of a border search.<sup>39</sup>

A "wetback" search conducted by immigration officers at a distance from the border often appears to be a border search. These searches are conducted by immigration officers pursuant to their authority to make searches for immigration violations within a reasonable distance (up to 100 miles) of the external boundary of the United States.<sup>40</sup> Frequently during such searches illegally imported contraband is discovered. Although not a border search as such,<sup>41</sup> if the discovery is reasonably related and incident to a search for immigration purposes, it is valid. However, the evidence may be seized in a manner inconsistent with any immigration purpose. Thus, searching a cigarette package, containing marihuana, unsupported by probable cause, could not be sustained because of the unlikelihood of finding an alien concealed therein.<sup>42</sup> Frequently, in the course of such a search, probable cause will develop. For example, if in searching for aliens an immigration officer sees an open package of marihuana, or upon opening the trunk of a car smells an odor which he recognized as that of marihuana, probable cause exists.<sup>43</sup>

At the border, probable cause is not the standard by which the reasonableness of the search is tested; mere suspicion has been held to justify such a search.<sup>44</sup> Additionally, neither a warrant nor an

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36. *Willis v. United States*, 370 F.2d 604 (5th Cir. 1966).

37. *Leeks v. United States*, 356 F.2d 470, 471 (9th Cir. 1966).

38. *Ng Pui Yu v. United States*, 352 F.2d 626 (9th Cir. 1965). *But see Plazola v. United States*, 291 F.2d 56 (9th Cir. 1961).

39. *Alexander v. United States*, 362 F.2d at 382-83; *Leeks v. United States*, 356 F.2d at 470.

40. An immigration officer may search any vehicle for aliens within a reasonable distance from any external boundary of the United States for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States. 8 U.S.C. § 1357(a)(3) (1964). "Reasonable distance" is defined to be up to 100 air miles. 8 C.F.R. § 287.1 (1967).

41. Normally these searches occur at regularly maintained immigration checkpoints. *Barba-Reyes v. United States*, 387 F.2d 91 (9th Cir. 1967) (about 70 miles from the border); *Renteria-Medina v. United States*, 346 F.2d 853 (9th Cir. 1965); *Fernandez v. United States*, 321 F.2d at 283. *But see Cervantes v. United States*, 263 F.2d 800 (9th Cir. 1959) (where only probable cause was discussed and found lacking, without a discussion of the validity of the search as an immigration search); *Contreras v. United States*, 291 F.2d 63 (9th Cir. 1961) (where the search could not justifiably relate to immigration matters).

42. *United States v. Hortze*, 179 F. Supp. 913 (S.D. Cal. 1959).

43. *Id.* at 917-18.

44. *E.g.*, *Thomas v. United States*, 372 F.2d at 254. There is authority for the

arrest is needed to search.<sup>45</sup> As a practical matter, this requirement of mere suspicion may be no requirement at all. It is too simple a standard to reduce to factual certainty. For example, to support a mere suspicion, an inspector would only have to allege that the individual was "nervous."<sup>46</sup> Nervousness, although a condition difficult to translate into actual physical symptoms, is very real and detectable. It is difficult to imagine an instance where the initial stopping could not be adequately and legally sustained by merely alleging that the individual was nervous.

When mere suspicion does exist, it justifies only a limited search of the individual's person and belongings.<sup>47</sup> Similarly a search of a vehicle or an external search of a person may be based on mere suspicion. Any further search of an individual's person obviously involves a more significant intrusion upon his privacy. Thus, a "strip search," one involving the removal of a person's clothes for a thorough search of the clothing and an external visual inspection of one's body, must be based on something more substantial than mere suspicion, but still less than probable cause.<sup>48</sup> The verbal formula has been set as a "real suspicion, directed specifically to that person . . . ."<sup>49</sup>

A search of one's stomach or body cavities has been held to be justified where there is a "clear indication" or "plain suggestion" that contraband may be located in that place.<sup>50</sup> Mere chance that contraband will be discovered beyond the body surface does not suffice to meet the test.<sup>51</sup> All of these verbal formulas still fall short of the classical legal test of probable cause for a search.<sup>52</sup>

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proposition that even mere suspicion is not needed for a detention for a limited search. *Henderson v. United States*, 390 F.2d 805, 808 (9th Cir. 1967). "[T]here is reason and probable cause to search every person entering the United States from a foreign country, by reason of such entry alone." *Witt v. United States*, 287 F.2d at 391. This conflicting language can be resolved internally. *Witt's* "probable cause" is only for a restricted type of search, and does not apply to more intrusive searches. *Henderson's* lack of "mere suspicion" only relates to the initial detention, not to the more intrusive inquiries.

45. *Landau v. United States Attorney*, 82 F.2d at 286.

46. *See Bible v. United States*, 314 F.2d 106 (9th Cir.), *cert. denied*, 375 U.S. 862 (1963).

47. *Henderson v. United States*, 390 F.2d at 808; *Bible v. United States*, 314 F.2d 106.

48. *Witt v. United States*, 287 F.2d at 391-92.

49. *Henderson v. United States*, 390 F.2d at 808.

50. *Id.* at 806; *Rivas v. United States*, 368 F.2d 703, 710 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967).

51. *Henderson v. United States*, 390 F.2d at 808.

52. *Rivas v. United States*, 368 F.2d at 710.

The vagaries of the legal standards permit considerable flexibility in the factual findings of a trial or appellate court. If the court is inclined toward a certain result, the process becomes a matter of construing the facts to support the desired result. It is not surprising to discover that such intrusions, patently offensive by their very nature, have been recently rejected and convictions have been reversed on a factual basis,<sup>53</sup> even though some question exists of whether the record below supports the factual findings of the appellate court.<sup>54</sup> What may be reflected by these apparent factual distortions is a growing opinion that such intrusive searches should be attended by a search warrant.<sup>55</sup> Such a factual approach fills the void left by present statutory and judicial law. However, such an approach, seemingly without adequate foundation, causes consternation to those parties critical of the integrity of the fact finding process of the courts.

In spite of the procedure whereby the results were reached, there may be good reason to shift the responsibility of deciding whether the facts present a valid justification for a body cavity search. Currently the decision rests with customs officials, whose concern is directed to discovering contraband, thereby perhaps obscuring their perception into the significance of the facts present.

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53. *Henderson v. United States*, 390 F.2d at 805; *Huguez v. United States*, \_\_\_\_ F.2d \_\_\_\_ (9th Cir. 1968). In *Huguez*, a fifth amendment "due process" contention, as well as a fourth amendment "unreasonableness of the search" argument, based on the same facts, resulted in a reversal of the conviction.

54. *Henderson v. United States*, 390 F.2d at 811-12 (dissenting opinion); *Huguez v. United States*, \_\_\_\_ F.2d at \_\_\_\_ (dissenting opinion).

55. This opinion was first set forth in *Blefare v. United States*, 362 F.2d 870, 887 (9th Cir. 1966) (dissenting opinion). In support of Judge Ely's position post-*Blefare* are *Border Searches and the Fourth Amendment*, 77 Yale L.J. 1007 (1968); Note, *Border Searches—Extractions From Body*, 18 W. Res. L. Rev. 1007 (1967); Note, *Search and Seizure at the Border—The Border Search*, 21 Rutgers L. Rev. 513 (1967); Comment, *The Reasonableness of Border Searches*, 4 Cal. W. L. Rev. 355 (1968); Comment, *Stomach Pumping Incident to Border Search Held Not an Unreasonable Search and Seizure*, 19 Fla. L. Rev. 374 (1966); Comment, *Intrusive Border Searches—Is Judicial Control Desirable?*, 115 U. Pa. L. Rev. 276 (1966). In *Huguez v. United States*, \_\_\_\_ F.2d at \_\_\_\_\_. The issue was avoided thusly:

We have considered but do not discuss the question of whether the doctor and the law enforcement officers here in *Huguez* should have, because of the absence of any emergency or compelling urgency, procured and served a search warrant before attempting to initiate the rectal cavity examination.

Extreme internal body searches, especially forcible, intrusive rectal cavity invasions, such as occurred in *Huguez*, if necessary or desired at border crossing, perhaps should be authorized only upon issuance of search warrants under appropriate judicial scrutiny, unless a true emergency or compelling urgency is apparent.



Requiring a search warrant would place the burden on the more impartial judicial officer, either the United States Commissioner or a judge. The result would be an inconvenience to all parties who must participate in securing a warrant for a body cavity search, but such inconvenience is to be balanced against indiscriminate body cavity searches. The dignity of the human person may be preserved with this additional safeguard against violation. Until this development occurs, the following warrantless types of searches have been upheld: (1) strip searches,<sup>56</sup> (2) searches of the stomach,<sup>57</sup> (3) rectal probes,<sup>58</sup> and (4) vaginal searches.<sup>59</sup>

The problem presented to the judiciary in adapting existing law to the border situation, especially in the area of intrusive body searches, is best illustrated by *Blefare v. United States*.<sup>60</sup> Previously in *Rochin v. California*,<sup>61</sup> the Supreme Court held that the use of a stomach tube, against the will of a party, to extract contraband from the stomach violated the fourth amendment. The condemnation of extraction of evidence from the stomach would appear to be clearly applicable to the *Blefare* facts, which involved the forcing of a tube through the party's nose and into his stomach so that an emetic could be administered. The *Blefare* court was able to distinguish *Rochin* in that the latter did not involve a border search.<sup>62</sup> In holding the search valid, the court recognized the

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56. *Witt v. United States*, 287 F.2d at 389.

57. *E.g.*, *Blefare v. United States*, 362 F.2d 870 (emetic); *Lane v. United States*, 321 F.2d 573 (5th Cir. 1963), *cert. denied*, 377 U.S. 936 (1964) (emetic); *Barrera v. United States*, 276 F.2d 654 (5th Cir. 1960) (use of emetic); *King v. United States*, 258 F.2d 754 (5th Cir. 1958), *cert. denied*, 359 U.S. 939 (1959) (Epsom salt used as an emetic). *But see* *United States v. Willis*, 85 F. Supp. 745 (S.D. Cal. 1949). *Willis* held use of a stomach pump to be defective under the fourth amendment. It is questionable, in view of the developments in this area, if *Willis* is of any value as authority today.

58. *E.g.*, *Rivas v. United States*, 368 F.2d at 703; *Denton v. United States*, 310 F.2d 129 (9th Cir. 1962) (use of a laxative); *Murgia v. United States*, 285 F.2d 14 (9th Cir. 1960), *cert. denied*, 366 U.S. 977 (1961); *Blackford v. United States*, 247 F.2d 745 (9th Cir. 1957). *See Huguez v. United States*, \_\_\_\_ F.2d \_\_\_\_.

59. *But see* *Henderson v. United States*, 390 F.2d at 805.

60. 362 F.2d 870 (9th Cir. 1966).

61. 342 U.S. 165, 172 (1952).

This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extration of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

62. Other factual distinctions tendered by the *Blefare* court included the wrongful presence of officers in *Rochin* and "the entire sequence of events." 362 F.2d at 875-77.

necessity to avoid constitutional sanction to this particular method of smuggling contraband. The complexity of the concealment for smuggling purposes permits a legally valid search to the same extent. Otherwise, "how are our border guardians to stop such smuggling? We again are faced with the practical problem: must the people of the United States permit the wholesale introduction of narcotic drugs into the United States?"<sup>63</sup>

## II. RE-INTRODUCTION OF CONTRABAND INTO THE UNITED STATES

When an individual departs from the United States for a contiguous foreign country such as Mexico, and returns into the United States after a short visit, what must he declare upon entry into the United States? By statute it is provided that:

Any person importing or bringing merchandise into the United States from a contiguous country . . . shall immediately report his arrival to the customs officer at the port of entry or customs house which shall be nearest to the place at which he shall cross the boundary line and shall present such merchandise to such customs officer for inspection.<sup>64</sup>

Furthermore, it is provided that "all merchandise imported or brought in from any contiguous country . . . shall be unladen in the presence of and be inspected by a customs officer at the first port of entry at which they shall arrive . . ."<sup>65</sup>

Technically, "merchandise" undoubtedly covers every item that is brought across the border, including all of the personal clothing and effects of an individual.<sup>66</sup> Inspection is an "essential prerequisite of entry of imported goods whether they are dutiable or not . . ." because "inspection is necessary to determine whether they are in fact non-dutiable."<sup>67</sup>

Title 18, United States Code, Section 545 proscribes two separate, distinct types of importation of merchandise. First, smuggling or clandestine introduction of merchandise which should have been invoiced is criminal.<sup>68</sup> The importation of merchandise

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63. *Rivas v. United States*, 368 F.2d at 711.

64. 19 U.S.C. § 1459 (1964).

65. 19 U.S.C. § 1461 (1964).

66. "Merchandise" includes even psittacine birds, or other items which may be subject to regulation by some governmental agency. *Duke v. United States*, 255 F.2d 721, 724 (9th Cir.), *cert denied*, 357 U.S. 920 (1958).

67. *United States v. Claybourn*, 180 F. Supp. 448, 452 (S.D. Cal. 1960).

68. 19 U.S.C. § 1484 (1964).

contrary to law, which involves the failure to immediately report to a customs officer and present the merchandise for inspection, is the second type of importation made a crime. Of course, both activities merge when merchandise is concealed at a port of entry. The second prohibition covers the situation where merchandise may be brought into the United States during daylight hours at a place other than a port of entry, for example along a beach or in the desert between ports of entry. The merchandise is not technically "smuggled" because it is in plain sight and the importation is not clandestine. However, failure to take steps to declare the merchandise makes this importation contrary to law.

In *United States v. Claybourn*<sup>69</sup> it was held that bringing goods taken from the United States back into this country, upon return from the foreign contiguous country, cannot amount to smuggling or clandestine introduction of merchandise.<sup>70</sup> "The purpose of the statute is to prevent the surreptitious, clandestine or fraudulent entry of the goods into the United States. If the goods were already in the United States, taking them out and bringing them in again would not be the act intended to be prohibited by the statute."<sup>71</sup> The court added in *Claybourn* that if one were to comply with the customs laws, it would be difficult to find the requisite "intent to defraud the United States."<sup>72</sup> Although smuggling is impossible under these circumstances, the failure to comply with customs regulations would still present the possibility of criminal liability. Establishing this violation of the statute would require proving that the acts were done fraudulently and knowingly. As a practical matter, proof of this element of specific intent would seem factually beyond the ability of the prosecution. In *Claybourn* the court found the requisite intent lacking.

For the defense, however, proving that goods may have originally been in the United States is more difficult than would seem at first. A criminal defendant, faced with a violation of this statute, must overcome the statutory presumption which reads: "Proof of defendant's possession of such goods, unless explained to

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69. 180 F. Supp. 448 (S.D. Cal. 1960).

70. *Id.*

71. *Id.* at 451.

72. *Id.* at 452. Intent to return merchandise smuggled into the United States to the foreign country of origin is no defense to a charge of importing merchandise contrary to law. *United States v. McKee*, 220 F.2d 266 (2d Cir. 1955).

the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.”<sup>73</sup> This language has been interpreted to mean that there is a permissible inference of illegal importation.<sup>74</sup> At the border, this inference is of little significance because the mere fact that the merchandise is discovered upon entry into the United States permits a reasonable inference of illegal importation.

When a casual foreign traveller, as distinct from a commercial importer, rightfully enters the United States from a foreign contiguous country, oral inquiry is made as to whether he is bringing anything from the foreign country. At this point, the party should technically enumerate all items. Implicitly, such an enumeration is not expected either by the customs officer or by the entrant. Each assumes that the inquiry refers to items obtained in the foreign country and imported into the United States for the first time by that individual. The oral declaration of items secured in the foreign country is a simultaneous declaration of items not obtained in that country. If merchandise is discovered that seems to have been obtained in the foreign country, proof that the goods originated in the United States would factually prevent a successful prosecution for importation contrary to law.

The impossibility of prosecution by federal authorities for smuggling or taking goods from the United States and then bringing them back into this country, and the improbability of prosecution for failing to comply with customs law does not mean that the possession of illegal merchandise or contraband will go unpunished. Thus, if marihuana or amphetamine tablets are re-introduced into the United States and discovered upon that re-introduction, there is no reason that the matter could not be and should not be referred to local jurisdictions for purposes of prosecution. Under such a situation, a criminal defendant is caught between Charybdis and Scylla.<sup>75</sup> In order to establish his affirmative defense in the federal case he has to admit to facts which render a state prosecution virtually indefensible.

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73. 18 U.S.C. § 545 (1964).

74. *Shore v. United States*, 56 F.2d 490 (D.C. Cir. 1931), *cert. denied*, 285 U.S. 552 (1932).

75. In Greek mythology, these are the whirlpool and rock.

## III. THE FIFTH AMENDMENT AT THE BORDER

*A. Importation Statutes*

The expanding application of the fifth amendment privilege against self-incrimination causes re-examination of that principle insofar as it applies to the border. The privilege can be raised in two instances. First, there is the issue of whether or not the smuggling and illegal importation statutes<sup>76</sup> contravene the fifth amendment. The second problem relates to the statutory presumption in each of these statutes,<sup>77</sup> and whether it offends the privilege.

The application of the fifth amendment to the declaration involved in the importation laws has never received serious consideration until recently when the argument was rejected.<sup>78</sup> One facet of this rejection was the argument that the privilege does not apply to the actual commission of a crime. Further it was reasoned that:

It would be strange indeed if one could Constitutionally be required to declare ordinary merchandise at the border and be punished for failure so to do, if, at the same time, surreptitious importation of contraband does not have to be declared and a failure to declare cannot be punished. The importation is not compelled and the Fifth Amendment privilege against compulsory self-incrimination does not apply.<sup>79</sup>

In *Marchetti v. United States*,<sup>80</sup> *Grosso v. United States*,<sup>81</sup> and *Haynes v. United States*,<sup>82</sup> involving gambling tax statutes, the fifth

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76. 18 U.S.C. § 545 (1964) (merchandise); 21 U.S.C. § 174 (1964) (narcotic drug); 21 U.S.C. § 176(a) (1964) (marihuana).

77. The presumption in Title 18 of the United States Code, Section 545 is quoted in text accompanying note 73 *supra*. The presumptions in the Title 21 offenses, Sections 174 and 176(a) differing only in the application to the respective contraband, "narcotic drug" and "marihuana," provide:

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession . . . , such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

78. *Rule v. United States*, 362 F.2d 215 (5th Cir. 1966), *cert. denied*, 385 U.S. 1018 (1967); *Haynes v. United States*, 339 F.2d 30 (5th Cir. 1964), *cert. denied*, 380 U.S. 924 (1965); *Ruiz v. United States*, 328 F.2d 56 (9th Cir. 1964); *Arrizon v. United States*, 224 F. Supp. 26 (S.D. Cal. 1963); *Pickett v. United States*, 223 F. Supp. 695 (S.D. Cal. 1963), *cert. denied*, 379 U.S. 939 (1964). See *Yee Hem v. United States*, 268 U.S. 178 (1925); *United States v. Eramdjian*, 155 F. Supp. 914, 927 (S.D. Cal. 1957).

79. *Rule v. United States*, 362 F.2d at 217.

80. 390 U.S. 39 (1968).

81. 390 U.S. 62 (1968).

82. 390 U.S. 85 (1968).

amendment privilege was held to apply to the actual or prospective commission of an offense. Thus, a portion of the argument supporting the nonapplicability of the fifth amendment to illegal importation has been eroded. In spite of these decisions, the statutes have still been upheld against this attack on appeal<sup>83</sup> and in the trial court.<sup>84</sup> By granting certiorari in *Leary v. United States*<sup>85</sup> the Supreme Court will consider the issue this fall.

The gambling tax cases, *Marchetti*, *Grosso* and *Haynes*, have been held factually distinguishable from the illegal importation situation.<sup>86</sup> In those cases, one could not register to pay the tax without subjecting himself to criminal liability. In this case, merchandise can be legally imported, and declaration does not mean criminal liability.<sup>87</sup> Similarly marihuana can be legally imported under federal law<sup>88</sup> and state law<sup>89</sup>. However, narcotic drugs may pose a more serious problem. While crude opium and coca leaves can be legally imported,<sup>90</sup> heroin falls into a separate category. It cannot be imported or manufactured in the United States.<sup>91</sup> Thus the importation of heroin is illegal, and the required declaration would subject the possessor to criminal penalty. However, this factor has not caused the narcotic smuggling statute to be distinguished on this ground when under a fifth amendment self-incrimination attack.<sup>92</sup>

### B. The Statutory Presumption

The statutory presumption contained in each of the illegal importation laws also raises issues of fifth amendment privilege against self-incrimination. Each statute provides in essence that evidence of possession of the contraband is sufficient to authorize

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83. *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *rehearing on supplemental petition*, 392 F.2d 220 (1968), *cert. granted*, 392 U.S. 903 (1968).

84. *United States v. Reyes*, 280 F. Supp. 267 (S.D. N.Y. 1968).

85. *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *rehearing on supplemental petition*, 392 F.2d 220 (1968), *cert. granted*, 392 U.S. 903 (1968).

86. *Leary v. United States*, 392 F.2d at 221.

87. *See Pickett v. United States*, 223 F. Supp. at 695.

88. 26 U.S.C. §§ 4741-57, 4771-75 (1964).

89. *Leary v. United States*, 392 F.2d at 221.

90. 21 U.S.C. § 173 (1964); 26 U.S.C. §§ 4701-07, 4721-26, 4731-36 (1964).

91. *Id.*; 18 U.S.C. § 1402 (1964); *Palermo v. United States* 112 F.2d 922, 924 (1st Cir. 1940); *United States v. Lee Foo Yung*, 46 F. Supp. 147, 149 (E.D. N.Y. 1942). *See Pon Wing Quong v. United States*, 111 F.2d 751, 756 (9th Cir. 1940).

92. *Murray v. United States*, No. 22, 340 (9th Cir. 1968).

conviction unless defendant's possession is satisfactorily explained to the jury.<sup>93</sup> Possession, in this context, is legally defined as dominion and control plus knowledge.<sup>94</sup> Upon a mere reading of the statutory presumption, the forceful impact seems to be that the criminal defendant's right not to take the witness stand is jeopardized by the law—he is forced to testify.

The statutory presumption has been upheld against a fifth amendment attack, both on the grounds of due process and the privilege against self-incrimination.<sup>95</sup> The courts have reasoned that the relationship between the fact proved and the inference to be drawn from that fact is not so “‘unreasonable as to be a purely arbitrary mandate.’”<sup>96</sup> The compulsion upon the defendant to testify is nonexistent.

The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case.<sup>97</sup>

The problem of the statutory language is its “sledge hammer” effect upon the trial jury. The unsophisticated juror is generally unable to distinguish possession as meaning “dominion and control” and legal possession, which includes the element of knowledge of the presence of the substance.<sup>98</sup> Skillful argument of the statutory language can, in effect, seem to shift the burden of proving his innocence to the defendant and relieve the prosecution from proving guilt beyond a reasonable doubt.<sup>99</sup> Thus, the language

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93. 18 U.S.C. § 545 (1964); 21 U.S.C. §§ 174, 176(a) (1964). When discussing the language and when citing, no distinction between the statutes will be noted because of the complete similarity of the three presumptions.

94. See text accompanying note 98 *infra*.

95. *Yee Hem v. United States*, 268 U.S. 178 (1925). See e.g., *Valenzuela-Hernandez v. United States*, 389 F.2d 460 (9th Cir. 1968); *Thomas v. United States*, 372 F.2d 252 (5th Cir. 1967).

96. *Yee Hem v. United States*, 268 U.S. at 184. See also, e.g., *Sanchez v. United States*, 398 F.2d 799 (9th Cir. 1968).

97. *Yee Hem v. United States*, 268 U.S. at 185. See also, e.g., *Morgan v. United States*, 391 F.2d 237 (9th Cir. 1968).

98. *United States v. Tijerina*, 138 F. Supp. 759, 760 (S.D. Tex. 1956) (where the convictions were reversed because the facts did not support a showing of knowing possession by the defendants).

99. In *Barone v. United States*, 94 F.2d 902, 903 (9th Cir. 1938), the court said that the

of the presumption has been described as "cryptic,"<sup>100</sup> and misleading.<sup>101</sup>

Actually, the presumption creates inferences<sup>102</sup> in favor of the United States on all elements of the offense.<sup>103</sup> "Inference" is the

statute "places upon the defendant the burden of proving his innocence, once the government has established his possession of the incriminating articles." See *United States v. Llanes*, 374 F.2d 712, 715-16 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967).

100. *Chavez v. United States*, 343 F.2d 85, 87 (9th Cir. 1965).

101. *Tomplain v. United States*, 42 F.2d 205, 206 (5th Cir. 1930).

102. *United States v. Llanes*, 374 F.2d at 715. As to the elements of illegal importation statutes, see *Burge v. United States*, 342 F.2d 408 (9th Cir.), *cert. denied*, 382 U.S. 829 (1965); *Robinson v. United States*, 263 F.2d 911 (10th Cir. 1959); *Kalos v. United States*, 9 F.2d 268 (8th Cir. 1925).

103. The statutes provide as follows:

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

21 U.S.C. § 174 (1964).

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

21 U.S.C. § 176(a) (1964).



preferred term to use in jury instructions rather than the much more forceful term, "presumption."<sup>104</sup> To evoke use of the statutory language<sup>105</sup> there must be sufficient facts to establish possession on the part of the accused.<sup>106</sup>

In cases away from the border, the statutory language can generally be used to establish the fact of illegal importation.<sup>107</sup> However, a denial on the part of the defendant of such knowledge suffices to rebut that inference.<sup>108</sup> To affirmatively establish such knowledge of illegal importation, the prosecution can show actual knowledge; but if not, the "test is whether there was a conscious purpose to avoid enlightenment."<sup>109</sup> At the border, the language of the statute is rarely applicable, as importation is never in issue. Knowledge of the presence of the contraband must be shown to establish possession in order to invoke the presumption. At the border, showing knowledge of the presence of the contraband is a simultaneous showing of knowledge of the illegal importation. Thus, in a prosecution for an incident occurring at the border, use of the presumption for its extra-legal effect upon the jury would seem to be an attempt to increase the possibility of conviction.

If these more meaningful explanations of the nature of the statutory language to the jury are required by the courts, it "may somewhat mar the full beauty of . . . [such language] for prosecutors. But, . . . the impairment is partial only since the defendant frequently does not take the stand, or makes some other defense, or may not be believed."<sup>110</sup> Finally it should be noted that the fifth amendment challenges of due process and self-incrimination are again before the Supreme Court of the United States this fall.<sup>111</sup>

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104. *Verdugo v. United States*, 402 F.2d 599 (9th Cir. 1968). In *Verdugo* "explicit reference to the statute itself in the charge" was discouraged as the "poorer practice." For a discussion of the relationship of a "presumption" to an "inference," see *Barfield v. United States*, where the conviction was reversed because of the use of the term "presumption" rather than "permissible inference" in a prosecution for interstate transportation of a stolen motor vehicle. 229 F.2d 936, 940-41 (5th Cir. 1956).

105. See material cited note 103 *supra*.

106. *Brumbelow v. United States*, 323 F.2d 703 (10th Cir. 1963) (insufficient factual showing of possession); *United States v. Tijerina*, 138 F. Supp. at 759 (insufficient factual showing of possession). See *Tomplain v. United States*, 42 F.2d at 206.

107. *United States v. Llanes*, 374 F.2d at 715.

108. *Id.* A mere denial will suffice only where the defendant has not "purposely avoided enlightenment." See also, *Chavez v. United States*, 343 F.2d at 87; *Griego v. United States*, 298 F.2d 845 (10th Cir. 1962).

109. *Griego v. United States*, 298 F.2d at 849.

110. *United States v. Llanes*, 374 F.2d at 716.

111. *Leary v. United States*, 383 F.2d at 851.

## IV. GOVERNMENTAL IMPORTATION

Under some circumstances agents of governmental units will be aware in advance that contraband is about to be imported into the United States. Arrangements are then made to insure that entry into the United States proceeds without impediment. The most common situation where this type of importation might occur is when the driver of a vehicle, which contains concealed contraband, is a government informant or "special employee" of the government. To illustrate what might factually happen in such a case, assume that the informer arrives at the port of entry. He identifies himself, and in response to the inquiry as to what he is bringing into the United States, he states that he is importing "thirty-five pounds of marihuana." He then explains to the inspector that his arrival was expected. A check of the veracity of the allegation results in allowing the car to proceed to its inland destination. At that location a different individual assumes dominion and control of the vehicle. That person is charged with (1) smuggling marihuana which should have been invoiced, (2) importing marihuana contrary to law, and (3) concealing and facilitating the transportation and concealment of illegally imported marihuana.<sup>112</sup>

Has a crime been committed? The advance information and knowledge on the part of the federal officials charged with the enforcement of customs laws seems to negate any possibility that the marihuana was smuggled or clandestinely introduced into the United States. The fact that the informant declares the marihuana, and is permitted to enter the United States appears to raise a serious question of whether customs laws and regulations were violated. That apparent criminal conduct may be immune from prosecution intrigues the imagination. Appellants in *Haynes v. United States*<sup>113</sup> argued that the marihuana was not illegally imported because it is not an offense for a government agent to bring marihuana into the United States; and further that since, under federal law, government agents are not required to pay any tax on marihuana, there was no violation of either the smuggling statute or the transferee statute.<sup>114</sup> However, without citation of

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112. The identity of the person who illegally imported the contraband need not be alleged. *Huizar v. United States*, 339 F.2d 173, 175 (5th Cir. 1964), *cert. denied*, 380 U.S. 959 (1965).

113. 319 F.2d 620 (5th Cir.), *cert. denied*, 375 U.S. 885 (1963).

114. 26 U.S.C. § 4744 (1964).

authority, the court stated: "Though when looked at from a completely technical point, these arguments may seem to have validity, this is only seeming because . . . [other facts constituted evidence of guilt]." <sup>115</sup> Or:

As we see it, though the defendants in this argument pile Pelion on Ossa <sup>116</sup> to deprive the case of legal substance by making it appear that there was no violation by the defendants but by the government itself, the facts, looked at in their reality and sequence, show that the commission of the offenses, as to which the appellants were convicted, is clearly and thoroughly established. <sup>117</sup>

*Guerra v. United States*, <sup>118</sup> concerned a civil suit by the government to foreclose a tax lien on illegally transferred marihuana. The marihuana had been brought into the United States from Juarez, Chihuahua, Republic of Mexico, while the vehicle was being followed by customs officials in Mexico. There is no suggestion that the driver had alerted customs officials that he would be entering the United States. What transpired at the border is unreported, but other facts tend to support a failure to declare the presence of the marihuana to the inspectors at the line. The driver was arrested in New Mexico, and cooperated in delivering the marihuana to Guerra in Pueblo, Colorado. The court stated:

Nor can we accept appellant's claim that the role played by government officials makes this transaction something other than a transfer. The officers neither devised nor directed the transportation scheme. *In substance, what they did was not to interrupt it.* They did no more than assist the carrying out of a mission that had been planned before they became aware of it. Defendant, meanwhile, performed every act necessary to bring the marihuana into his possession. <sup>119</sup>

Once again there is no citation of authority in this discussion.

In *Juvera v. United States* <sup>120</sup> the defendant was charged with smuggling and concealing heroin. The informer had driven the

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115. 319 F.2d 620, 622.

116. In Greek mythology, the Titans, in their futile attempt to reach and attack the gods in heaven, piled Ossa, a mountain in eastern Greece, on Pelion, another mountain, and both on Olympus.

117. *Haynes v. United States*, 319 F.2d at 622.

118. 371 F.2d 584 (10th Cir. 1966).

119. *Id.* at 586 (emphasis added).

120. 378 F.2d 433 (9th Cir. 1967).

load into the United States, and had informed customs officials of the impending importation. The court argued as follows:

Other contentions are made here which are too frivolous to be worthy of comment. Thus it is asserted that because Miramontes, the government informer, was the person who actually carried the narcotics across the boundary, no crime was committed here. Nothing is more common than to have convictions of unlawful sales upheld where the purchaser is a government agent. It would be equally absurd to argue that in such cases no crime was committed.<sup>121</sup>

For this statement the court cited *Haynes v. United States*<sup>122</sup> and added in the footnote:

The proof of importation by the defendant is not based upon any claim of misconduct by Miramontes. What Miramontes did here was to transport the automobile as a container of narcotics in the same manner in which an express company might have transported a box of narcotics as a common carrier. The defendants here are being prosecuted for their own wrongful acts and intent and not as aiders or abettors of some government agent.<sup>123</sup>

The lack of citation of authority, the absence of reference to legislative intent, and the absence of intellectually compelling reasoning on this issue by the courts reflect a simplistic reaction to the facts: a person should not be able to avoid criminal liability because of a fortuitous circumstance over which he had no control and which was unexpected by him. The undeniable existence of criminal *intent* and planning compelled the court to find the appellant guilty without facing the issue of whether in fact the criminal act alleged had taken place.

*Haynes* reflects a complete boot-strap rationale. The court concluded guilt without discussing the appellant's allegation that the critical fact of illegal importation was lacking. This superficial reasoning is set forth in spite of the recognition given to the obvious tenability of appellant's position. *Guerra* is factually distinguishable because the importation was clearly contrary to law, and is, on that basis, not applicable. *Juvera* analogizes

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121. *Id.* at 437.

122. 319 F.2d 620 (5th Cir.), *cert. denied*, 375 U.S. 885 (1963).

123. *Juvera v. United States*, 378 F.2d at 437, n.4.

erroneously to an undercover sale, in which the seller has the requisite intent and does the necessary act.

Of course, the theoretical considerations may present only an illusory problem. It would seem that the prosecution could avoid the issue presented by the informer's introduction of contraband into this country by charging a conspiracy to commit the prohibited act. The narcotics and marihuana smuggling statutes contain their own proscriptions against conspiring to commit any of the other conduct made criminal by the statute.<sup>124</sup> The general federal conspiracy statute<sup>125</sup> applies to conspiring to violate the merchandise smuggling statute. With respect to Title 21 conspiracies, it is not necessary to allege an overt act.<sup>126</sup> Furthermore, it is not even necessary to prove that any of the acts took place within the United States.<sup>127</sup> Thus, the acts of conspiring and confederating to smuggle marihuana or narcotics would not be dependent upon or in any manner affected by the fact that the government was responsible for the importation of the contraband. Even if it were necessary to find an overt act committed within the jurisdiction of the prosecuting district, the act of introducing the contraband into the United States could provide the requisite overt act. An overt act in any conspiracy need not be criminal in nature;<sup>128</sup> the only requirement is that the act be in furtherance of the conspiracy.<sup>129</sup> Importing the contraband, even if not "contrary to law," would suffice to satisfy the conspiracy element of an overt act.

If a conspiracy is not charged, there should be better-reasoned judicial justification to uphold a determination that the conduct of the parties is criminal in spite of the fact that the government is responsible for the presence of the contraband in this country. On the surface it would seem that legislative intent could provide a meaningful tool to hue the same result. Obviously the comprehensive attack by Congress on smuggling and illegal importation provides a basis for arguing that the statute is violated even though an informer brings the contraband into the country.

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124. 21 U.S.C. §§ 174, 176(a) (1964).

125. 18 U.S.C. § 371 (1964).

126. *Ewing v. United States*, 386 F.2d 10, 15 (9th Cir. 1967); *Leyvas v. United States*, 371 F.2d 714, 717 n.4 (9th Cir. 1967).

127. *See Brulay v. United States*, 383 F.2d 345, 350 (9th Cir. 1967).

128. *Yates v. United States*, 354 U.S. 298, 334 (1957).

129. *Id.*

Alternatively, it could be argued that the importation is still contrary to law with respect to those who are not present at the border when the importation occurs. Those parties are of the opinion and have a good faith belief that the importation will be contrary to law. This state of mind arguably satisfies the allegations of smuggling or illegal importation. However, the act requirement can never be satisfied by a belief in a fact, if there is no act.

The alarming aspect of this discussion is that a failure to provide an intellectually satisfying rationale to explain why criminality is not avoided in the informer-importation situation opens the door for the equally simplistic acceptance of the superficial logic that no criminal act has taken place. Impetus to the appeal of this logic will undoubtedly result from Judge Ely's reaction to the situation in his dissent in *Lannom v. United States*.<sup>130</sup> There appellant was charged with transporting and concealing marihuana which he knew to have been illegally imported. Judge Ely stated as follows:

The prosecution should have been required to prove, at the very least, that the government itself did not, through one of its own agents, accomplish the importation. If the government itself imported the marihuana, it is indeed anomalous that it is now permitted to say that the accused "knew" that the substance had been imported "illegally, contrary to law."<sup>131</sup>

## V. THE INFORMER AT THE BORDER

### *A. Identity of the Informer*

In the border situation, the problem of revealing the identity of informers may arise. In the typical situation, the informer will be a person who observes a vehicle or persons located in or about a known narcotics dealer's place of business. The informer usually does no more than observe and relay the description of the person or vehicle to the officials at the border.<sup>132</sup>

With respect to informers, the main issue is one of disclosure. The Supreme Court has held in *Roviaro v. United States*<sup>133</sup> that

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130. 381 F.2d 858 (9th Cir. 1967).

131. *Id.* at 862-63.

132. *Rodriguez-Gonzalez v. United States*, 378 F.2d 256, 257 (9th Cir. 1967); *Alexander v. United States*, 362 F.2d 379, 381 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966).

133. 353 U.S. 53 (1957).

disclosure is mandatory where the informer is an active participant in the crime, or where the informer might be of assistance in the defense of the case. If disclosure is ordered, and the government chooses still to refuse to identify the informer, the court then may dismiss the case. In *Roviaro* when the narcotics were being transferred the informer was in the car with the accused and the narcotics agent was concealed in the trunk of the vehicle. Other than those three parties, no one else was involved in the transaction. The Court in *Roviaro* held that the identity of the informer should have been revealed under those circumstances. In addition, the decision purported to render some authoritative guidelines to assist in determining the propriety of requiring disclosure of the informer's identity. The Court stated:

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.<sup>134</sup>

It is difficult to imagine that the type of informer usually present in a border case will ever begin to approach the *Roviaro* situation.<sup>135</sup> Invariably, however, if there is the slightest suggestion or inkling that an informer is involved, defense counsel will move to have the identity of the informer disclosed.<sup>136</sup> Almost as frequently the prosecution will seek to avoid being compelled to make the disclosure. The motion is made with the hope that a governmental

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134. *Id.* at 62.

135. The informer's "tip" was only as to the identity of the automobile said to be carrying narcotics. There was no information as to the identity of the occupants of the car, other than that they were "two negro males." Moreover, the informant gave his information from the Mexican side of the border and at a time before the offense with which appellant was charged could have been committed in . . . [the United States].

*Alexander v. United States*, 362 F.2d at 381.

From these facts the court found that "the informant was admittedly neither a participant in, nor a witness to, the crime charged in the indictment, and of which appellant stands convicted." *Id.* at 383. The motion to reveal the informer was appropriately denied.

136. "It seems fair to state, as the government charges, this seeking of a name appears to be merely 'a shot in the dark.'" *Hurst v. United States*, 344 F.2d 327 (9th Cir. 1965). See *Jones v. United States*, 326 F.2d 124 (9th Cir. 1963).

refusal to disclose the identity of the informer, after the identification is ordered, will result in a dismissal of the case.

*B. Procedure On Motion To Reveal The Informer*

The procedure by which the determination is made involves an evidentiary hearing conducted outside the presence of the jury and appropriately prior to the trial of the case.<sup>137</sup> This type of motion and a motion to suppress physical evidence under Rule 41(e) of the Federal Rules of Criminal Procedure are similar. Presumably the developments regarding a motion to suppress would apply to a motion to reveal the identity of the informer. Thus, the prohibition against use at the time of trial of evidence, given by the accused at the time of hearing on the motion to suppress,<sup>138</sup> would seem to apply in the informer hearing motion.<sup>139</sup>

At the hearing on the motion to reveal the identity of the informer, the burden is on the defense to go forward and present evidence in order to fit within the *Roviaro* formula. What evidence can the accused present? Quite often, the accused believes that the factual basis can be established through the testimony of the governmental agent to whom the information was given.<sup>140</sup> To establish the truth of the matter stated, defense counsel questions the substance of the informer's statements. It is obvious that such inquiries elicit hearsay responses. Are they admissible under any exception to the rule? Since no exception to the hearsay rule readily applies, it is submitted that the evidence should not be admissible.

Is the defendant disabled from continuing with his motion? Obviously not. The accused can take the stand and present the necessary evidence to require disclosure of the identity of the informer. The defense risks nothing because any evidence rendered

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137. *King v. United States*, 348 F.2d 814 (9th Cir.), *cert. denied*, 382 U.S. 926 (1965).

138. *Simmons v. United States*, 390 U.S. 377 (1968).

139. *Id.* at 393-94. The Court's reasoning seems as applicable to the motion to reveal the informer as to a motion to suppress.

A defendant is "compelled" to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forgo a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created.

140. *Ruiz v. United States*, 380 F.2d 17 (9th Cir. 1967).



at that time could not be used by the prosecution in its case in chief.<sup>141</sup> However, as a practical matter, if defendant did take the witness stand and testify in a manner which would shift the burden to the prosecution on the motion, he might effectively be barring his ability to testify at the trial. To establish his right to have the informer identified, the defendant may be forced to incriminate himself. Evidence incriminating to the defendant at the time of the motion almost assures that the accused will exercise his privilege not to testify at trial. For this reason, testimony offered at the time of trial, which is contradictory to that given at the time of the motion, might subject the defendant to a possible perjury charge.

Of course, the defense could call other witnesses to make the necessary showing. However, the evidence presented often has been found insufficient; denials of the motion to reveal the informer have not been held error on appeal in a border situation.<sup>142</sup> In spite of the following showings by the defense, the court has refused to compel the prosecution to reveal the informer's identity: (1) a Mexican, with whom defendant had an altercation, allegedly planted the heroin in defendant's cigarette package;<sup>143</sup> (2) an informer allegedly planted marihuana in the locked rear compartment of defendant's vehicle in order to collect the reward;<sup>144</sup> and (3) heroin was allegedly placed in a dustpan under defendant's car by a named individual who allegedly had a violent dislike for defendant.<sup>145</sup>

It is not unusual for a criminal defendant to actually be acquainted with the party who turns out to be the informer or "special employee" of the government. If the informer is a participant in the case, the issue turns from disclosure to one of calling the informer as a percipient witness to the facts. In the border situation, the informer is often a Mexican, over whom the

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141. See *Simmons v. United States*, 390 U.S. at 377 (1968).

142. *Encinas-Sierras v. United States*, 401 F.2d 228 (9th Cir. 1968); *Ruiz v. United States*, 380 F.2d at 17; *Alexander v. United States*, 362 F.2d at 379; *Hammond v. United States*, 356 F.2d 931 (9th Cir. 1966); *Cook v. United States*, 354 F.2d 529, 531 (9th Cir. 1965); *King v. United States*, 348 F.2d at 814. Cf. *Miller v. United States*, 273 F.2d 279 (5th Cir. 1959). But see *Lopez-Hernandez v. United States*, 394 F.2d 820 (9th Cir. 1968). In *Lopez-Hernandez*, although the incidents occurred at the border, the informant participated in a sale of heroin to a federal undercover agent. The refusal to disclose the informant's identity, on the basis of materiality was held to be prejudicial error. The "sale" case parallels the *Roviano* facts, regardless of where the sale occurs. The fact that this purchase occurred at the border is of no significance.

143. *Powell v. United States*, 374 F.2d 386 (9th Cir. 1967).

144. *Jones v. United States*, 326 F.2d at 124.

145. See *Barone v. United States*, 94 F.2d 902 (9th Cir. 1938).

government has no jurisdictional power. In spite of this lack of jurisdiction, the government may be able to produce the informant to testify with a reasonable effort. However, presently, there is "no rule that the government is under any general obligation to produce an informer."<sup>146</sup> Moreover, the government cannot be held responsible if the informer either refuses or is not available to take the witness stand.<sup>147</sup> If the record shows a good faith effort by the prosecution to produce such a witness, even if the effort is not productive, there is no error.<sup>148</sup>

If the informer is available to be called, failure of the government to insure his appearance in court is not error; defendant can subpoena the witness.<sup>149</sup> A continuance might be appropriate<sup>150</sup> to produce the witness; a denial of the same could be error.<sup>151</sup>

Although the general balancing with respect to requiring disclosure deals with the "public's interest in stopping wrongdoing . . . and the individual's right to prepare his defense,"<sup>152</sup> the existence of a "snitch" in a border incident compels a close examination of the informer's role. Physical well-being of the informer is a paramount consideration. "[D]isclosure of an informant's name, particularly in a border-crossing case involving narcotics, can have grave consequences. . . ."<sup>153</sup> Furthermore, disclosure of the informer to the accused "as the one responsible for his arrest would serve to encourage the criminal to wreak his vengeance on the informer."<sup>154</sup> This possible consequence is to be measured against the "inherently dangerous procedure"<sup>155</sup> of employing persons who are eager "to produce as many accused as possible at the risk of trapping not merely an unwary criminal but sometimes an unwary innocent as well."<sup>156</sup>

The difficulties presented to defense in the area of ascertaining the identity of the informer in the border situation are illustrated in

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146. *Velarde-Villarreal v. United States*, 354 F.2d 9, 12 (9th Cir. 1965).

147. *Id.* at 12-13.

148. *Id.* at 13; *Tapia-Corona v. United States*, 369 F.2d 366 (9th Cir. 1966).

149. *Alvarez v. United States*, 282 F.2d 435, 439 (9th Cir. 1960).

150. *United States v. Cimino*, 321 F.2d 509 (2d Cir. 1963).

151. *United States v. White*, 324 F.2d 814 (2d Cir. 1963).

152. *Hurst v. United States*, 344 F.2d at 327.

153. *Id.*

154. *Powell v. United States*, 374 F.2d at 387.

155. *Velarde-Villarreal v. United States*, 354 F.2d at 13.

156. *Id.*

*Lannom v. United States*.<sup>157</sup> At the trial, the customs agent to whom the information had been given was called by the defense. The information related by the informer to the customs agent was the subject of testimony. Since the government failed to raise the hearsay objection, the admissibility of the evidence on these grounds was not in issue. The informer had seen the vehicle being loaded with the marihuana, but the appellant was not present at that time, nor was the informer present when appellant was arrested. Although absence of appellant at the moment the contraband was placed in the vehicle might have bearing on his knowledge of its presence, the court held that there was not a sufficient showing that the informant could be of assistance in the defense of the case. "Mere speculation that the informer might possibly be of some assistance is not sufficient to overcome the public interest in the protection of the informer. The claim that the informer was a participant was merely hopeful thinking."<sup>158</sup> The problem of making the appropriate showing has also been stated as follows:

If the informer's relation to the acts leading directly to or constituting the crime may be assumed from a fertile imagination of counsel, the government in practically every case would have to prove affirmatively that the informant had not done any such likely acts. Having done that, all would be revealed and the informer privilege, deemed essential for the public interest, for all practical purposes would be no more.<sup>159</sup>

Finally, two additional aspects might affect the possible disclosure of the informer. First, the defendant should proceed cautiously because the theory of his case may be destroyed if the information is related to events on the American, as opposed to the Mexican, side of the border. Pressing the government on the informant issue may show additional, confirming evidence of a defendant's criminality.<sup>160</sup> Second, the government might offer a stipulation conforming to the theoretical considerations of defense counsel. For example, if the informant merely observed the loading

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157. 381 F.2d 858 (9th Cir. 1967).

158. *Id.* at 861. Appellant also argued that he was foreclosed from showing that the informer was a participant in the offense by driving the load vehicle. The court found that appellant had not been prevented from reaching this issue, and in fact, in response to his own question, was told that the informer did not drive the vehicle. *Id.* at 862.

159. *Miller v. United States*, 273 F.2d at 281.

160. *Powell v. United States*, 374 F.2d at 388.

of the vehicle, and defendant was not present (a fact arguably favorable to the defense of the case), a stipulation that the informer would so testify, if called, would seem to serve the purposes of both the defense and the government. Such a stipulation, received in evidence, would not weaken the government's case. The absence of the transporter of the marihuana at the time it is loaded can always be explained in the context of a sale in Mexico of contraband. The usual procedure of the Mexican dealer involves loading the contraband outside the presence of other participants in the smuggling. Rejection of such an offered stipulation by the defense militates against a judicial determination requiring disclosure of the informer's identity.

#### VI. DETENTION AT THE BORDER—IS THE PERSON “IN CUSTODY”?

At the time that an individual applies for entry into the United States, the inspector normally asks one question relating to the citizenship of the individual. The next question relates to whether or not any merchandise is being brought into this country. If both answers are satisfactory, are subsequent questions and responses admissible at a later trial in spite of the fact that constitutional warnings per *Miranda* are not given?<sup>161</sup> Arguably any questions beyond the two initial inquiries may constitute a “focusing” of criminal liability,<sup>162</sup> and thus an implicit restriction on one's freedom in a significant way<sup>163</sup> which should be attended by *Miranda* warnings. Quite frequently, the responses to these questions prove incriminating. The questions might relate to the ownership of the vehicle or the whereabouts of the travellers in the foreign country. Later, after appropriate *Miranda* warnings are given, these same questions may be answered in a different manner. The inconsistent responses always require some acceptable explanation by the defendant. The difficulty in tendering a reasonable explanation always places the defendant in a less favorable light.

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161. No attempt will be made in this article to resolve the philosophical theories of government presented by Congressional passage of Title II, Omnibus Crime Control Bill, which purports to overrule *Miranda*. Until that conflict is resolved, this author will proceed to discuss this issue insofar as *Miranda* may apply.

162. *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

163. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

One argument for admitting the statements, without having complied with *Miranda* is the absence of “in custody” detention as required by that decision. *Miranda* looks to the “in custody” situation because of the coercive atmosphere that is provided by that circumstance. However, *Miranda* also states that the privilege against self-incrimination attaches where an individual is deprived of freedom of action in any significant way.<sup>164</sup> Once the right to enter the country is established, any further detention certainly falls within the category of a deprivation of freedom of action in a significant way. It is quite obvious that the failure to respond to a question would result in detention. Equally true is that such detention probably would qualify as a border search in view of the lesser standard needed to search. Although the two initial questions may have been answered satisfactorily, physical nervousness coupled with the refusal to answer subsequent questions may constitute “mere suspicion” justifying a search at the border.

Regardless of the consequences of a prolonged customs detention, it is clear that the international traveller is subjected to the coercive atmosphere similar to that attendant in the “police station.” The traveller is pressured to respond to the inquiry. To refuse will generate undesirable consequences—the incriminating effect of a refusal to answer, as well as a prohibition against travelling inland.

Thus, it is not surprising to discover judicial approval for holding the question and response defective under *Miranda*. In *Deck v. United States*,<sup>165</sup> the lower court found that the statement was not within *Miranda*. However, the mention of it in the opening statement by governmental counsel was held not to be error. Although the court did not discuss the issue at all in the appeal, it did quote the lower court’s expression of doubt as to the inadmissibility of the statement, and the correctness of its ruling.<sup>166</sup>

On the other hand, there is authority directly in point holding *Miranda* inapplicable to the customs detention situation. In *United States v. Davis*<sup>167</sup> defendant brought a motion to suppress statements made to the customs officials. Initially, he was

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164. *Id.* at 444, 478.

165. 395 F.2d 89 (9th Cir. 1968).

166. *Id.* at 92.

167. 259 F. Supp. 496 (D.C. Mass. 1966).

168. *Id.* at 497.

questioned while "under detention, which did not last over an hour and a quarter. . . ." <sup>168</sup> In spite of the fact that he was restricted to the ship by customs officials, the court found that he had not been deprived of his freedom of action in a significant way. <sup>169</sup> The following day, before being arrested pursuant to a warrant, he was asked certain questions to which he gave incriminating responses. This factual situation was also found to be insufficient as a ground for invoking the *Miranda* warnings. <sup>170</sup>

In support of the latter holding, it could be argued that the inspector is merely performing his duty in determining whether or not to admit the person into the United States. The additional questions may be justified in order to satisfy the requirements of customs laws relating to the declarations and invoicing of merchandise brought into this country. <sup>171</sup> Ownership of a car and extent of foreign travel appear to reasonably relate to the issue of whether there may be merchandise or contraband being introduced into this country. If there is this justification for the questions on "customs" grounds, it would seem that *Miranda* would not apply. <sup>172</sup>

## VII. INCLUDED OFFENSES IN IMPORTATION STATUTES

Finally, an analysis of the three smuggling statutes reveals a close similarity in the language used. Each proscribes smuggling, illegal importation, concealing and facilitating the transportation or concealment of contraband. Each one contains basically the same statutory presumption which arises from a finding of possession of contraband by a defendant. <sup>173</sup>

Conviction under 21 U.S.C. Section 174 carries with it a mandatory penalty of a minimum five years. Neither probation <sup>174</sup> nor parole <sup>175</sup> is available to one convicted of this offense. Thus a person so convicted will only receive credit for "good time" <sup>176</sup> in

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169. *Id.* at 498.

170. *Id.* See also *United States v. Jones*, 184 F. Supp. 328, 331 (N.D. Cal. 1960).

171. 19 U.S.C. §§ 1459, 1461, 1484, 1485 (1964).

172. See *United States v. Burkeen*, 350 F.2d 261, (6th Cir.), *cert. denied*, 382 U.S. 966 (1965).

173. See text accompanying note 90 *supra*.

174. 26 U.S.C. § 7237(d) (1964).

175. Act of Aug. 25, 1958, Pub. L. No. 85-752, § 7, 72 Stat. 845, 847.

176. 18 U.S.C. § 4161 (1964). The statutory construction of "good time" provides:

Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for

prison, and will do approximately three years and nine months on the minimum sentence of five years. A maximum of twenty years is possible. A second conviction carries with it a mandatory penalty of ten years,<sup>177</sup> with the same attendant consequences as far as probation and parole are concerned. Conviction under 21 U.S.C. Section 176(a) carries the same mandatory penalty of five to twenty years. However, whereas probation is still precluded,<sup>178</sup> parole is not. Thus, a person sentenced to the mandatory minimum of five years could be considered for parole after serving one-third of his term,<sup>179</sup> which would be twenty months, less the time earned as "good time." Conviction under 18 U.S.C. Section 545 carries a maximum sentence of five years, with no mandatory minimum and the possibility of probation available.

The possible sentences are set forth to dramatize the issue of whether the three smuggling statutes overlap in their application. If they do, and if a jury is permitted to find a defendant guilty of Section 545 instead of the violations carrying the mandatory minimums, the advantages available to a defendant are clear and desirable.

The vehicle by which the lesser penalty offense could be invoked is the rule that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged . . . ."<sup>180</sup> Under federal law, the nature of a lesser included offense is not well defined. There is a sparsity of authority dealing with the subject.<sup>181</sup> Important considerations in determining an overlapping of offenses include: (1) whether there is a similarity of elements;<sup>182</sup> and (2) whether the criminal conduct is defined in varying degrees.<sup>183</sup> One test employed is phrased in terms of whether it is impossible to commit the greater offense without first having committed the lesser one.<sup>184</sup> It has been said that this test applies to the situation

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life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction [and such deduction is deemed "good time"]. . . .

177. 26 U.S.C. § 7237(a) (1964).

178. 26 U.S.C. § 7237(d) (1964).

179. 18 U.S.C. § 4202 (1964).

180. FED. R. CRIM. P. 31(c).

181. See 12 *Cyclopedia of Federal Procedure*, § 48.348 (1965).

182. *Giles v. United States*, 144 F.2d 860, 861 (9th Cir. 1944). See *Berra v. United States*, 351 U.S. 131, 134 (1956) (where the Court found no error in refusing a lesser included offense instruction where the facts needed to prove both crimes were identical).

183. See *United States v. Ciongoli*, 358 F.2d 439, 441 (3d Cir. 1966).

184. *Salinas v. United States*, 277 F.2d 915, 918 (9th Cir. 1960); *Giles v. United States*, 144 F.2d at 861.

where two separate crimes are involved, and not where there is but one crime with varying degrees depending on the existence of an aggravating factor.<sup>185</sup> Ultimately, it is submitted that the result will turn upon a judicial determination whether the legislative branch intended that multi-level punishment attach to certain criminal conduct.

In the smuggling area the acts made criminal by all three statutes are identical. The differentiating factor is intent. All statutes call for acts to be done "knowingly." Knowledge implies a good faith belief in a fact. Thus, if a driver of a vehicle is told that the car contains marihuana, and if he believes this assertion to be a fact, and if the car does have marihuana concealed therein, the man is guilty of smuggling marihuana even though he may never see, certainly not touch, smell or in any manner experience any sensory perception of the contraband. He would be guilty even if he saw the vegetable matter and believed it to be marihuana, though neither experience nor a chemical test could establish positively that the matter is marihuana.

If a person admits that he knew he was smuggling something, and that "something" turns out to be merchandise, he is guilty only under 18 U.S.C. Section 545. If the "something" proves to be either marihuana or narcotics, he would not be guilty of any Title 21 offense, for to be guilty of those sections, the individual must know (have a belief) that the "something" is either marihuana or narcotics. Consider the following hypotheticals:

(1) If an individual actually believes that he is smuggling sugar, and it turns out to be sugar, he is guilty of 545. If the substance is chemically shown to be heroin, he is not guilty of 174, because there is no knowledge that the substance is a narcotic drug. But is he guilty of 545 in that the merchandise smuggled was heroin?

(2) If he believes that he was smuggling heroin, and it was heroin, there is no problem. However, if the knowledge relates to a narcotic drug and the substance is sugar and not heroin, he is not guilty of 174 because there is no narcotic drug being imported. But is he guilty of 545?

(3) If the smuggler thinks he has narcotics, but has in fact marihuana, of what section is he guilty? Not 174 (no act) and not 176a (no knowledge) but what again about 545?

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185. *Salinas v. United States*, 277 F.2d at 918.



Only a general intent to smuggle is necessary under 545. Specific intent to smuggle the specific item is necessary for the other two offenses.<sup>186</sup> Therefore, the more specific intent exists in addition to the general intent. Presumably the prosecution could charge a defendant who is discovered bringing narcotics and marihuana into the United States with separate counts for smuggling merchandise, said merchandise being in each count marihuana and narcotics.<sup>187</sup> Moreover, two additional counts could be charged for each substance under Title 21. The jury would be instructed that if they find that he has merely a general intent to smuggle something into the United States, he can be found guilty of the merchandise counts. If they find that he knew the substances were marihuana and narcotics, they can find him guilty of those counts.

The problem arises because invariably only the Title 21 offenses are charged. Is it error for a court to refuse to give a "lesser included" offense instruction dealing with 545? There appears to be no authority for holding that it is error for a court to refuse to give such an instruction.

Thus the risk is obviously with the government. Should the government choose to go to trial on a narcotic smuggling charge, and should the jury believe that the defendant knew he had something but did not know that what he had was a narcotic, defendant would be acquitted on smuggling narcotics and walk out of the courtroom. Although his intent to smuggle something would be present, the government would lose the felony conviction.

However, the prosecution may wish to put the jury to the difficult choice each time. Failing to charge the 545 offense takes away from the jury the ability to allow sympathy to enter into their deliberations, and convict of the offense with the lesser penalty. Although juries are instructed that the matter of punishment is not within their province, it is suggested that jurors know the consequences of convicting of the various offenses. The prosecution may feel that jurors, faced with this difficult task, will do their duty on the basis of the facts. The prosecution thus achieves the desired deterrent effect of the greater sentences which would not result if the

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186. *E.g.*, *Burge v. United States*, 342 F.2d 408, 410 (9th Cir.), *cert. denied*, 382 U.S. 829 (1965).

187. In *United States v. Tijerina*, 138 F. Supp. 759 (S.D. Tex. 1956), defendant was charged with smuggling merchandise (18 U.S.C. § 545), to wit one-quarter pound of marihuana.

jury were permitted to convict a defendant of the offense with the lesser penalty.

There is authority for resolution of this problem, based on interpretation of legislative intent. In *Palermo v. United States*<sup>188</sup> the court found that the term "merchandise" as used in the forerunner of 545 did not include "opium" because Congress had enacted the more specific statute dealing with importation of opium.<sup>189</sup> Such a distinction provides the short answer in this area.

On the other hand there is authority that later Congressional treatment of certain items does not foreclose a prosecution under 545.<sup>190</sup> Among the items so judicially treated are LSD,<sup>191</sup> psittacine birds,<sup>192</sup> liquor,<sup>193</sup> and gold.<sup>194</sup> Like opium, however, lottery tickets are treated differently.<sup>195</sup> Neither dates of enactment<sup>196</sup> nor severity of punishment<sup>197</sup> adequately explains different judicial treatment. The absence of a uniform rationale in these cases leaves the matter open to argument.

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188. 112 F.2d 922, 925 (1st Cir. 1940); *United States v. Lee Foo Yung*, 46 F. Supp. 147, 149 (E.D. N.Y. 1942).

189. *Palermo v. United States*, 112 F.2d at 925.

190. *E.g.*, *Roseman v. United States*, 364 F.2d 18 (9th Cir. 1966), *cert. denied*, 386 U.S. 918 (1967).

191. *Id.* (involving the Federal Food, Drug and Cosmetic Act).

192. *Duke v. United States*, 255 F.2d 721 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958) (involving regulations of the Surgeon General).

193. *Callahan v. United States*, 53 F.2d 467 (3d Cir. 1931), *aff'd*, 285 U.S. 515 (1932) (involving the National Prohibition Act).

194. *United States v. Kushner*, 135 F.2d 668 (2d Cir.), *cert. denied*, 320 U.S. 212 (1943) (involving the Gold Reserve Act).

195. *United States v. Mueller*, 178 F.2d 593 (5th Cir. 1949).

196. *Roseman v. United States*, 364 F.2d at 25.

197. *Compare* *Palermo v. United States*, 112 F.2d at 922 (more severe punishment and exclusion of opium from "merchandise") *with* *Roseman v. United States*, 364 F.2d 18 (less severe punishment and no exclusion) *with* *United States v. Mueller*, 178 F.2d at 593 (less severe punishment and exclusion of lottery tickets from "merchandise").